THE INSURANCE POLICIES

The insurance policy which was in effect at the time Jacobs Bank filed suit against Industrial Technologies was in force from July 21, 1992, to July 21, 1993. (C. 563-576). The policy requires that:

> The insured shall give immediate written notice to this company of any loss, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, furnish a complete inventory of the destroyed, damaged, and undamaged property, showing in detail quantities, costs, actual cash value and amount of lost claims; and within sixty days after the loss, unless such time is extended in writing by this company, the insured shall render to this Company a proof of loss, signed and sworn to by the insured [. . .].

(C. 564). The policy further states that the amount of the loss for which the company,

> may be liable shall be payable sixty days after the proof of loss, as herein provided, is received by this Company and an ascertainment of the loss is made either by agreement between the insured and this Company expressed in writing or by the filing with this Company of an award as herein provided.

Id.

"No suit on this policy for the recovery of any claim shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, and unless commenced within twelve months next after the inception of the loss." (C. 564). Further the policy provides,

"This company may require from the insured an assignment of all right of recovery against any party for loss to the extent that payment therefore is made by this Company."

In addition to requiring a written sworn proof of loss, the policy states, "The insured, as often as may be reasonably required, shall exhibit to any person designed by this Company all that remains of any property herein described, and submit to examinations under oath by any person named by this company and subscribe to same; . . ." (C. 564).

Regarding notice, the Appellant claims that he put Capital Alliance on notice of a claim in the summer of 1993. There is a letter regarding two pieces of missing machinery, a Lagun Milling Machine and a Hardness Testing Machine. (C. 662). The final communication concerning those two pieces of missing machinery is dated May 11, 1994, which was a telefacsimile from Fred Gouge of Capital Alliance to Mr. Richard Hill requesting that he call regarding the loss. (C. 413). Apparently, Mr. Hill did not respond because those two pieces of equipment had re-appeared. (C. 716). Mr. Hill did not attempt to speak to anybody at Capital Alliance until February, 1998. (C. 732, 755-56). This conversation took place after plaintiff's counsel sent a letter to Tom Jones Insurance in Tuscumbia, Alabama, with a copy to "Al Garcia, Skandia". (C. 682-683). That letter explained:

> No claim was made on the insurance policy previously as a result of the fact that Industrial Technologies, Inc. and Richard Hill were uncertain as a result of the litigation as to what would be included in the damages which Industrial Technologies, Inc. and Richard Hill were awarded and what was not covered, thereby preventing Industrial Technologies, Inc. and Mr. Hill from

> making an accurate, truthful and representative claim without duplicating any attempt for recovery on said equipment.

(C. 683). This was the stated reason for the delay in filing notice of the destruction of the equipment in 1995.

The Appellant erroneously asserted in numerous places throughout his Alabama Supreme Court brief that a sworn proof of loss was filed. (Appellant's Corrected Brief, pp. 18, 31 (two times), 44, 46 and 48). On May 4, 1998, the Appellee, Capital Alliance, acting through counsel, did take a sworn statement of Mr. Richard O. Hill. (C. 685-776). On May 18, 1998, the Appellee sent Appellants a blank sworn proof of loss. (C. 414). On June 19, 1998, the Appellee again sent the Appellant a blank proof of loss form requesting that it be completed. (C. 415-416). In that letter, it was explained that the policy required a sworn proof of loss in addition to an examination under oath. The terms of the policy clearly set forth two different obligations.

Assuming that this claim in 1998 was for the destruction of the equipment in 1995, as opposed to the conversion of the equipment which occurred in 1992 and 1993, the policy which was in effect is found in the clerk's record at 607-623. This 1995 policy also has two separate conditions precedent or obligations imposed on the insured concerning an examination under oath and providing a sworn proof of loss. (C. 623). Under the section entitled Duties in the Event of Loss or Damage, the following language is found:

> (a) You must see that the following are done in the event of loss or damage to Covered Property:
>
> (1) Notify the police if a law may have been broken.

(2) Give us prompt notice of the loss or damage. Include a description of the property involved.

(3) As soon as possible, give us a description of how, when and where the loss or damage occurred.

(4) Take all reasonable steps to protect Covered Property from further damage by a Covered Cause of Loss. If feasible, set the damaged property aside and in the best possible order for examination. Also, keep a record of your expenses for emergency and temporary repairs, for consideration in the settlement of the claim. This will not increase the Limit of Insurance.

(5) At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.

[. . .]

(7) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

(8) Cooperate with us in the investigation or settlement of the claim.

> (b) We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

There is no signed proof of loss in the record, because none was ever provided by the insured to Capital Alliance.

The policy prohibits transfers of plaintiff's rights and duties under the policy. "Your rights and duties under this policy may not be transferred without our written consent except in the case of death of an individual named insured." (C. 658). Plaintiff purported to transfer its rights to Whitney National Bank. (C. 792-95).

The 1995 policy also states as follows under the Commercial Property Conditions:

> (D) LEGAL ACTION AGAINST US.
>
> No one may bring a legal action against us under this Coverage Part unless:
>
> 1. There has been full compliance with all of the terms of this Coverage Part; and
>
> 2. The action is brought within 2 years after the date on which the direct physical loss or damage occurred.

After the sworn statement in May, 1998, there was some communication concerning the Jackson County litigation.

However, there was no request to defend the Jacobs Bank suit, nor any proof of loss that was sent to Capital Alliance about the damaged equipment.

In August of 2002, a letter was sent via telefacsimile advising that Whitney Bank had filed suit against Mr. Hill and Industrial Technologies over a note which was executed in March of 2001. (This letter is not in the record). Capital Alliance did deny a defense to the Whitney Bank suit. (C. 814).

B. Procedural Facts

Whitney National Bank filed a Complaint in the Circuit Court of Autauga County, Alabama, on July 2, 2002, against Richard O. Hill and Industrial Technologies. (C. 12-13). The Respondents were not named defendants. The Complaint alleges that Whitney National Bank is the successor in interest to the Bank of Prattville, and that Richard O. Hill and Industrial Technologies, Inc. owe, "the sum of $139,150.00, together with interest in the amount of $11,433.42 at a rate of 10.75% per annum due by agreement made on March 20, 2001, and is now past due." (C. 12). Further, it demands a reasonable attorney's fee in Count I. Count II seeks execution on the security agreements to satisfy the debt. It specifically refers to described property in "Exhibit 'A'" (C. 12-13). There is no Exhibit A attached to the Complaint, although there are UCC filing statements and security agreements. (C. 27, et seq.).

The Petitioner filed an Answer and affirmative defenses on or about August 27, 2002. (C. 45-63). Richard Hill and Industrial Technologies, Inc. (hereinafter IT or Industrial Technologies) also filed a counterclaim against Whitney National Bank. (C. 64-81). On August 30, 2002, Richard Hill and IT filed a third party complaint against Capital Alliance

Insurance Company, Inc. (hereinafter Capital Alliance), Capital Assurance Company, Inc. (hereinafter Capital Assurance) and Skandia America Reinsurance Corporation (hereinafter Skandia). (C. 82-101).

Count I of the third party complaint requests a declaration of rights concerning coverage issues. Count II alleges a breach of contract on the part of the third party defendants. Count III alleges that the defendants acted in bad faith. Count IV simply alleges that if Industrial Technologies and Hill are liable to Whitney National Bank, the Capital & Skandia defendant should pay those claims.

The third party defendant Capital Alliance filed a motion to dismiss setting forth as grounds for the motion to dismiss the statute of limitations, failure to serve process properly, statute of frauds, lack of privity, laches, unclean hands and that the plaintiff had received a judgment against the third party tortfeasor Jacobs Bank. (C. 115-116). The defendants Capital Assurance and Skandia filed a motion to dismiss generally averring that the service of process was improper and ineffective. (C. 117-124). The failure of service was cured.

Hill and Industrial Technologies filed a "Motion to Add Plaintiff as Necessary Party to the Third Party Claim and/or Crossclaim of Defendants Against Third Party Defendants; or Alternatively, Motion for Realignment of Plaintiff's Claim with Defendants' Claim Against Third Party Defendant." (C. 153-160). This pleading alleges that the equipment which was destroyed by Jacobs Bank was collateral for the loan to the Bank of Prattville, Whitney National Bank's predecessor in interest. (C. 155-156). This motion also avers that Whitney National Bank, "technically is entitled to a priority or absolute payment of the claim first prior to any remaining proceeds

being paid to the defendants under the insurance policy." (C. 157). On May 13, 2003, a Motion to Dismiss and Answer was filed on behalf of all three third party defendants. (C. 181-184). This Answer adopted by reference the last policy in effect from January 28, 1996 to January 28, 1997. (C. 185-210).

The three third party defendants filed a motion for judgment on the pleadings on or about November 24, 2003. This was based on the third party plaintiff's pleading that they were not entitled to prosecute this claim, and Whitney National Bank had priority. Whitney National Bank was never realigned as an involuntary plaintiff against these three defendants. (C. 319-321).

A motion for summary judgment in favor of the three insurance defendants was filed on the 29th day of December, 2003. (C. 382-384). The supporting documents for the motion to dismiss can be found in the clerk's record, C. 385-454. The memorandum of law in support of the motion for summary judgment is found in the record at C. 455-474. The plaintiff's Memorandum of Law in Support of Response to Motion for Summary Judgment begins in the record at 475 and ends at 492. The plaintiff filed a Response to the Motion for Summary Judgment. (C. 493-497). The plaintiff's supporting documents are found at pages 498-831.

The trial court entered an order granting Whitney National Bank's motion for summary judgment and dismissing Capital Assurance Company, Inc. and Skandia Reinsurance Corporation as party defendants and the trial court incorrectly granted summary judgment in favor of Capital *Assurance* on January 26, 2004. (C. 832-834). The trial court amended its order to correctly grant the summary judgment in favor of Capital Alliance Insurance Company. (C. 845)

On June 14, 2004, the plaintiff filed a notice of appeal of the Whitney National Bank judgment and the judgment in favor of Capital Alliance Insurance Company and Capital Assurance Company, Inc. (C. 897). Skandia was not named in the Notice of Appeal. The plaintiff Whitney National Bank settled with Industrial Technologies and Richard O. Hill while the appeal was pending, and Hill and IT voluntary dismissed the appeal against Whitney National Bank. (C. 926-927). The notice of appeal was only filed against Whitney National Bank, Capital Alliance Insurance Company, Inc. and Capital Assurance Company, Inc., not Skandia (C 897).

The plaintiffs raised eight (8) issues on appeal, none of which mention either the Constitution of Alabama or the United States Constitution. The only citation to a Constitutional provision is found in the plaintiffs' Statement of Jurisdiction, which it to Article VI of the constitution of Alabama, 1901, as amended by Amendment 328, Section 6.02(b)(1) and (2). This provision generally grants the Alabama Supreme Court jurisdiction to hear the appeal.

In the Respondent's Motion for Rehearing the brief raises ten (10) issues an appeal. The additional tenth issue on appeal raises a Constitutional issue for the first time. No Constitutional issue was raised at the trial court nor in the original appeal to the Alabama Supreme Court.

REASONS FOR DENYING THE PETITION

I. This Court lacks jurisdiction to review the Alabama Supreme Court's decision to affirm summary judgment in this case, because that court did not pass upon any federal or constitutional issues.

Pursuant to Rule 28 U.S.C. § 1257(a),

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

This Court's cases have long held that the Court will "not decide federal constitutional issues raised here for the first time on review of state court decisions." *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). In the present case, Industrial never raised a constitutional issue in the trial court. After the trial court entered summary judgment without opinion, Industrial filed a motion pursuant to the *Alabama Rules of Civil Procedure* asking the trial court to alter, amend, or vacate the summary judgment order. In this motion, Industrial did not bring up any federal or constitutional issues concerning the no-opinion summary judgment; rather, Industrial simply re-argued the existence of substantial evidence and the impropriety of summary judgment. After the trial court denied this motion, Industrial instituted an appeal to the Alabama Supreme Court, again making no mention of any federal or constitutional issues concerning the no-opinion order of summary judgment. When the Alabama Supreme Court affirmed the trial court's entry of

summary judgment, Industrial applied for rehearing, mentioning for the first time its belief that constitutional rights were at issue. The application for rehearing was denied without opinion.[1]

It is apparent that the Supreme Court of Alabama did not pass upon Industrial's constitutional challenge. The appellate courts of Alabama do not consider constitutional issues that were not first raised in the trial court. *Ross v. Alabama Bd. Of Chiropractic Examiners*, 724 So.2d 540 (Ala. Civ. App. 1998) ("in order for appellate court to review a constitutional issue, that issue must have been raised by the appellant and presented to and reviewed by the trial court"), citing *HealthAmerica v. Menton*, 551 So.2d 235 (Ala. 1989). See also *Continental Eagle Corp. v. Mokrzycki*, 611 So.2d 313, 322 (Ala. 1992) (constitutional challenge must have been raised in a lower court before appellate court will review it); *Campbell v. Alabama Power Co.*, 567 So.2d 1222, 1225 (Ala. 1990) (holding that issues not raised in the trial court may not be raised later on appeal); *Chatman v. City of Prichard*, 431 So.2d 532, 533 (Ala. 1983) (holding

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1. Under Alabama appellate practice, an application for rehearing is generally used to point out to the appellate court how the questions that were decided are contrary to the record, rather than to bring up new issues for the first time. "The office of an application for rehearing is to invite a re-examination of the questions decided in respect to their soundness as applied to the merits of the case as presented on appeal." *Redd Chemical & Nitrate Co. v. W.T. Clay Mercantile Co.*, 219 Ala. 478, 479, 122 So. 652, 653 (1929). "The object and purpose of an application for rehearing is to invite review by the court as to the correctness of the opinion and judgment of the court as presented on the record upon which the case is submitted." *Gossett v. Pratt*, 250 Ala. 300, 301, 34 So.2d 145, 146 (1947). The purpose of the application is not to raise new constitutional issues never presented in any prior proceedings.

that Alabama Supreme Court need not address the merits of an argument raised for the first time on appeal); *Smiths Water Authority v. City of Phenix City*, 436 So.2d 827, 830-31 (Ala. 1983) (holding that Alabama Supreme Court will not consider a theory or issue that was not pleaded or raised in the trial court); *Hutchins v. Shepard*, 370 So.2d 275, 276-77 (Ala. 1979) (holding that an issue not raised in the trial court cannot be raised for the first time on appeal).

Because Industrial presented no constitutional issues to the trial court, the trial court did not consider and rule upon any such issues. The Alabama Supreme Court therefore did not rule upon those issues (even by inference in denying the application for rehearing, which was the first place such issues were ever raised). This Court, in turn, does not have jurisdiction to review the orders of the Alabama Supreme Court. In *Webb v. Webb*, 451 U.S. 493 (1981), this Court re-affirmed this principle:

> This Court has frequently stated that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 [] (1969); see also *Fuller v. Oregon*, 417 U.S. 40, 50, n. 11 [] (1974); *Chambers v. Mississippi*, 410 U.S. 284, 290, n. 3, [] (1973); *Bailey v. Anderson*, 326 U.S. 203, 206-207, (1945).
>
> . . .
>
> It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows

> either expressly or by clear implication that the federal claim was adequately presented in the state system. *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 [] (1928); *Oxley Stave Co. v. Butler County*, 166 U.S. 648, 655 [] (1897).

Id. at 496-97. The Court continued:

> [T]here should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law. Otherwise, we cannot be sufficiently sure, when the state court whose judgment is being reviewed has not addressed the federal question that is later presented here, that the issue was actually presented and silently resolved by the state court against the petitioner or the appellant in this Court.

Id. at 502 (emphasis in original) (holding that because petitioner failed to raise federal claim in the state proceedings and the state supreme court failed to rule on a federal issue, Court was without jurisdiction and writ was dismissed). Because no state court ruled on any federal question, this Court does not have jurisdiction to review this case.

II. Assuming this Court has jurisdiction to review the orders of the Alabama Supreme Court, Industrial's constitutional rights have not been impaired.

A. Industrial Technologies Received Due Process and Equal Protection Under the Fourteenth Amendment to the United Stated Constitution.

Industrial argues that the no-opinion order of the Alabama Supreme Court affirming the no-opinion order of the trial court violates its rights under the Fourteenth Amendment to the United States Constitution, for three reasons.

First, Industrial argues that the record did not support the decision of the Alabama Supreme Court to affirm summary judgment. Industrial cites *Vachon v. New Hampshire*, 414 U.S. 478 (1974) and *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 723 F.2d 238, 304 (3d Cir. 1983) in support of its argument that a lack of evidence in the record supporting summary judgment violates Industrial's right to due process. *Vachon* was a criminal case in which an individual who sold a vulgar button to a minor was convicted under a New Hampshire statute which made it unlawful to "willfully" contribute to the delinquency of a minor. Because there was no evidence in the trial record that the defendant personally sold the item to the minor, this Court held that "willfully" had not been established and reversed the conviction. The Court cited *Harris v. United States*, 404 U.S. 1232, 1233 (1971) for the rule that "[i]t is beyond question, of course, that a conviction based on a record lacking any relevant evidence as to a crucial element of the offense charged . . . violate(s) due process." The other case cited by Industrial, *Zenith Radio* (overruled by this Court on other grounds), was a case in which the federal circuit court

simply inserted a footnote citing *Vachon* for the general principle that "a judgment supported by no evidence on an essential element violates due process." *Id.* at 304 n.55.

Both of these cases are inapposite because in this case the record supported the trial court's entry of summary judgment. Under Rule 56(c)(3) of the *Alabama Rules of Civil Procedure*, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The Alabama Supreme Court reviews *de novo* an appeal from summary judgment. *Ex parte Union Camp Corp.*, 816 So.2d 1039, 1042 (Ala. 2001). The Alabama Supreme Court properly affirmed summary judgment based on the record because Industrial failed to satisfy conditions precedent to coverage or indemnification. Industrial failed to provide a sworn proof of loss (as opposed to examination under oath) specifically required by the policy. Under Alabama law, summary judgment was appropriate on this ground. *Nationwide Insurance Co. v. Nilsen*, 745 So.2d 264, 267 (an insurer's obligation to pay or to evaluate the validity of an insured's claim does not arise until the insured has complied with the terms of the contract with respect to submitting claims); *United Insurance Company of America v. Cope*, 630 So.2d 407, 412 (until plaintiff submitted a claim in the form specified by the terms of the policy, the insurer had no duty to investigate the claim). Additionally, summary judgment was proper because Industrial failed to notify Capital Alliance of the loss "as soon as possible" or "promptly" as required under the policy. Despite learning of the destruction of the equipment in 1995, the record evidence revealed that Industrial elected not to report the loss to Capital

Alliance until 1998. Further, It failed to ask for a defense of the Jacobs Bank litigation. Not until five years after the policy of insurance expired did It make a request for a defense—of the Whitney Bank litigation. The Whitney Bank litigation arose from a contract signed by Mr. Hill four years after the insurance policy expired. In sum, the record before the trial court and the Alabama Supreme Court supported the entry of summary judgment, and therefore any due process challenge to the no-opinion order fails.

Secondly, Industrial argues that its Fourteenth Amendment rights were violated because it was "denied a remedy and/or access to the courts." Industrial cites several cases that purportedly support this argument, although they are completely dissimilar to the present set of issues. Two of the cases deal with the issue of denial of access to the courts through the requirement of the payment of court fees. *Boddie v. Connecticut*, 401 U.S. 371 (1971) (holding that where women who lived in poverty were barred from going to court to obtain a divorce because they could not pay the required fees, due process requirements were violated); *United States v. Kras*, 409 U.S. 434 (1973) (holding that, unlike the fees involved in *Boddie*, the fees required of impoverished petitioner in bankruptcy did *not* violate the Constitution). Two of the cited cases deal with bias in the enforcement of the law. *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) (statutory requirement that fines collected in FLSA proceeding be returned to a branch of the Department of Labor did *not* create an impermissible risk of bias in violation of due process clause of the Fifth Amendment); and *In Re Murchison*, 349 U.S. 133 (1955) (bias of trial judge violated due process, where the same judge who sat as a state's one-man grand jury and heard witness testimony, also presided over a contempt hearing where witnesses were found in contempt for their conduct during that one-man grand jury).

None of these cases or principles apply to this case. Industrial was not denied access to the court or a remedy in the courts. The Constitution requires that "an opportunity [be] granted at a meaningful time and in a meaningful manner for a hearing appropriate to the nature of the case." *Boddie*, 401 U.S. at 379 (internal quotation marks and citations omitted). Industrial does not like the outcome of the case, but that does not mean that Industrial's constitutional rights to court access were violated, or that the process was somehow biased or inherently unfair. The petition should be denied on this issue.

Industrial's third contention is that the orders of the trial court and the Alabama Supreme Court denied Industrial's right to a remedy and/or an appeal that all other persons with similar property interest claims receive, in violation of the equal protection clause of the Fourteenth Amendment. This argument is premised on Industrial's belief that the summary judgment is unsupported by the record which, as previously discussed, is an incorrect belief. Additionally, Industrial cites no case indicating that the Alabama Supreme Court's orders in this case violate its constitutional right to equal protection. Industrial cites *Plyer v. Doe*, 457 U.S. 202 (1982), in which this Court held that Texas could not deny to undocumented alien schoolchildren the free public education that it provided to children who were United States citizens or legal aliens. Industrial also cites *F.S. Royster Guao Co. v. Virginia*, 253 U.S. 412 (1920) (Virginia law that exempted from income tax domestic corporations who did no business within that state was an arbitrary classification and did not comply with equal protection, where domestic corporations that conducted business both inside and outside the state had to pay income tax on income from outside the state); and *Connell v. Sears Roebuck & Co.*, 722 F.2d 1542 (5th Cir. 1983) (not an equal

protection case). Industrial cites no authority for its proposition that the facts of this case implicate equal protection issues, and in fact no such issues exist. The petition should be denied as to this ground.

B. Rule 53 of the *Alabama Rules of Civil Procedure* Does Not Impair Contracts, Prevent Performance Under Contracts, or Prevent Enforcement of Contract Rights. The Contracts Clause of the United States Constitution is Not Implicated in This Case.

Industrial claims that Rule 53 of the *Alabama Rules of Civil Procedure* denied a remedy to Industrial for breach of the insurance contract with Capital Alliance, in violation of the contract clause of the United States Constitution, Article I, § 10 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts."). The Alabama rule allows "no opinion" affirmances by state appellate courts:

> ARAP 53(a) Affirmance Without Opinion.
>
> The Supreme Court or the Court of Civil Appeals may affirm a judgment or order of a trial court without an opinion if the court determines:
>
> (1) That an opinion in the case would serve no significant precedential purpose; and
>
> (2) That one of the following circumstances exists:
>
> > (A) The judgment or order appealed from is based on findings of fact that are not clearly, plainly, or palpably erroneous;

> (B) The evidence adequately supports the jury verdict on which the judgment or order is based;
>
> (C) In a nonjury case in which the judge has made no specific findings of fact, the evidence would support those findings that would have been necessary to support the judgment or order;
>
> (D) The order of an administrative agency is sufficiently supported by the evidence in the record;
>
> (E) The appeal is from a summary judgment, a judgment on the pleadings, or a judgment based on a directed verdict, and that judgment is supported by the record; or
>
> (F) The court, after a review of the record and the contentions of the parties, concludes that the judgment or order was entered without an error of law.

This provision does not prevent Industrial from performing under the contract of insurance (paying premiums and complying with the contract's provision) or from enforcing rights under the contract. This rule allowing Alabama appellate courts to rule without writing an opinion does not deny enforcement rights. The Federal Courts are also permitted to issue "no opinion" decisions. *See Federal Rules of Appellate Procedure* 36(a)(2). Industrial cites no authority that would support the construction urged Industrial. The petition should therefore be denied on this issue.

CONCLUSION

In conclusion, Capital Alliance requests that this Court deny the petition for writ of certiorari sought by Industrial. Capital Alliance respectfully asserts that this Court lacks jurisdiction over this case, and further that no constitutional violations have occurred.

Respectfully submitted,

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(3)

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No. 05-108

In The

SUPREME COURT OF THE UNITED STATES

INDUSTRIAL TECHNOLOGIES, INC.,

Petitioner,

v.

CAPITAL ALLIANCE INSURANCE COMPANY
and
CAPITAL ASSURANCE COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court of Alabama

REPLY TO BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the United States Supreme Court has jurisdiction.

II. Whether the right to due process of law guaranteed to Industrial Technologies, Inc., by the Fourteenth Amendment to the United States Constitution was deprived when the Trial Court and the Alabama Supreme Court each issued no opinion decisions granting motions for summary judgment to two (2) insurance companies that Industrial has sued for breach of contract and bad faith.

III. Whether the no opinion decision granting summary judgment to said insurance company defendants was tantamount to the denial of a remedy to Industrial Technologies, Inc., and access to the courts contrary to the Fourteenth Amendment due process clause of the United States Constitution.

IV. Whether the no opinion decision denying Industrial's claims is tantamount to the denial of Industrial's right to a jury trial remedy and of the right to an appeal remedy when each is enjoyed by all other persons in the Sate of Alabama alleging similar claims and similarly situated as to the facts of the Industrial Technologies claims and thereby violated the equal protection clause of the Fourteenth Amendment to the United States Constitution.

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III. The no opinion decision granting summary judgment to said insurance company defendants was tantamount to the denial of a remedy to Industrial Technologies, Inc., and access to the courts contrary to the Fourteenth Amendment due process clause of the United States Constitution.

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I. THE UNITED STATES SUPREME COURT HAS JURISDICTION.

28 U.S.C. § 1257 states in pertinent part:

"(a) Final judgments or decrees rendered by the highest Court in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the grounds of its being repugnant to the Constitution, treaties, or laws of the United States....or....any title right privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

1. Alabama law grants Industrial, and all persons similarly situated, the right to a jury trial on issues raised by a breach of contract action including the condition precedent performances which were asserted in the case below. See HealthSouth Rehab. Corp v Falcon Management, 799 So2d 177 (Ala. 2001), United Fidelity and Guaranty Ins. Co. v Baldwin County Homeowners Assoc., 770 So2d 72 (Ala. 2000). Article 1, Section 11, Constitution of Alabama (1901), 12-2-7(4), Code of Alabama, 1975.

2. Alabama law grants Industrial, and all persons similarly situated, an appeal as of right to the Alabama Supreme Court in such cases and requires a *de novo* review of summary judgment decisions, judgments and orders. See Article VI Section 328 6.01, 6.02 Constitution of Alabama, 1901; 12-2-7, Code of Alabama, 1975; Ex parte Union Camp Corp. 816 So2d 1039 (2001). The review would clearly show the waiver of all grounds now asserted by Respondents. Rhode Island Ins. Co. v Holley, 226 Ala. 320, 146 So. 817 (1933; Home Ind. Co. v Reed Equipment Co., Inc., 381 So.2d 45 (Ala, 1980).

3. The constitutional violations alleged herein could not have been raised, under the facts of this case, prior to the Alabama Supreme Court's No Opinion Affirmance of the No Opinion Trial Court Summary Judgment Order on December 17, 2004, because

the State may not impose the duty to file an objection to an unconstitutional judgment upon a person prior to the time that he can reasonably assume that it will occur.

The timeliness of the constitutional objection can be shown by a brief review of the Alabama law and procedure involved. The Alabama Supreme Court entered a No Opinion Affirmance of a trial court's No Opinion Judgment granting a Summary Judgement against Petitioner as to all claims raised by the Petitioner Industrial against the Insurance Defendants Capital Alliance Insurance and Capital Assurance Company on December 17, 2004. The Petition for Rehearing was timely filed in the Alabama Supreme Court. Petitioner specifically and specially raised constitutional issues caused by the cumulative no opinion judgments alleging that the No Opinion Judgment of the Alabama Supreme Court violated (1) the due process clauses of the Fourteenth Amendment to the United States Constitution; (2) the equal protection clause of the Fourteenth Amendment; and (3) as to any decision based on the 1992-1993 insurance contract, the contract clause to the United States Constitution, Article 1, Section 10, Clause 1. On February 11, 2005, the Petition for Rehearing was denied without opinion again under Rules 53(a)(1) and 53(a)(2)(F), *Alabama Rules of Appellate Procedure*. Since Alabama law and procedure provides for the right of *de novo* appellate review of summary judgment orders of a trial court as entered below, it was the first time that Petitioner could conclude that his case had been treated in a manner that violated the constitutional provisions alleged and that the Supreme Court had reviewed the trial court judgment as if the review was nothing more than a review of a trial court judgment by application/petition for a writ of certiorari.

Petitioner also contends that where a Petitioner clearly presents the issue to a state supreme court the jurisdiction of the United States Supreme Court will not depend on whether the state court addressed the constitutional/federal question. It is enough that the constitutional claims were clearly and specially made and presented for review at the appropriate time. (*Lynk v. La Porte Superior Court No. 2*, 789 F.2d 554 (7th Cir. 1986). Furthermore, Petitioner contends that it must be assumed that the court has been given fair opportunity to review the merits of

the petitioner's claim on direct appeal for purposes of presentation and exhaustion principles.

This court has jurisdiction under 28 U.S.C. § 1257 because petitioner has properly presented the constitutional issues specially and exhausted his only state court remedies on the constitutional issues raised by this petition. Indeed, the Alabama Supreme Court decisions of December 17, 2004, and February 11, 2005, are final as to all issues raised by the law applied in the record on appeal.

II. The right to due process of law guaranteed to Industrial Technologies, Inc., by the Fourteenth Amendment to the United States Constitution was deprived when the Trial Court and the Alabama Supreme Court each issued no opinion decisions granting motions for summary judgment to two insurance companies that Industrial had sued for breach of contract and bad faith. That is, the judgement is not supported by the facts.

Respondents, in their Brief in Opposition to the Petition for a Writ of Certiorari, contend that the decision of the Alabama Supreme Court was a correct decision based upon the facts and supported by independent state grounds. In asserting these defenses or positions in their brief, Respondents have included a statement or cluster of factual assertions that Petitioner contends are misleading. Examples of misleading factual omissions are as follows:

At page 1 of their Brief in Opposition, the Respondents contend or infer that the alleged August 14, 2002, insurance company letter concerning the Industrial insurance claims and demands only referred to the defense of a Whitney National Bank action. Respondents indicate that they denied a defense to Industrial because it was only an action against Petitioner Industrial for default in payments to Whitney on a note executed by Industrial not earlier than March 20, 2001; many years after all of the insurance contracts in question had expired by their terms. This factual reference omits to state that Count II of the Whitney Complaint against Industrial seeks to have the trial court declare Whitney's interest in several collateral and insurance proceeds matters placed before the court that may be

payable for any such damaged collateral. Moreover, Count II shows attached documents that result from capital insurance contracts, other contracts, secured documents, etc., covering a period from at least July, 1996 to the date of suit. Although it is undisputed that Whitney held the secured documents and UCC financing statements necessary to protect its interest in collateral and insurance proceeds, Respondents omit to state that they were issues included in the Count II claim and attached to the Complaint (C-12-42). Respondents also omit to state that the loss-payee provisions of each and every policy that the Capitals issued, either singularly or jointly, to Industrial secured the collateralized property involved in the Whitney litigation for proceeds payable on the destruction of the insured property in the event of a covered loss. Indeed, the Respondents omit facts that show they are, at least, a necessary party to the action.

At page 3 of Respondents' Brief, and again at page 9, Respondents contend that Industrial allegedly completed an assignment of all its rights and duties to Whitney National Bank, and breached the contract between them, which bars recovery. Respondents omit to disclose that Whitney legally rejected the assignment and asserted a legal rejection in the responsive pleading it filed in the trial court below. Moreover, Respondents omit to state that the qualifying loss payee, its successors by operation of law (merger), are allowed to pursue the secured collateral claims for proceeds under material provisions of the contract to the same extent as insured if such contract rights can be shown as an interest created by the insured . Therefore, the transfer of an interest in a loss payee lender specifically addressed in the policy does not breach the contract or bar recovery, which facts were also omitted by Respondents. The loss payee benefits are contract rights of Whitney. See Anderson v Brooks 446 So2d 36 (Ala. 1984).

At page 4 of Respondents' brief, they contend that the 1992-1993 policy contained no duty to defend and, therefore, they have no duty to pay attorney fees and/or litigation expenses to Industrial. Respondents omit to state that the 1992-1993 policy contained a duty to pay covered claims on conditions that were fulfilled by Industrial during 1993 and coverage benefits were properly demanded on April 5, 2002, prior to litigation of the

issues presented securing collection under the March 20, 2001 note. The omissions are specifically that Industrial reported the covered loss of wrongful conversion on June 28, 1993, submitted to a deposition statement on July 1, 1993, informed Capital Alliance of the Jacobs action and the conversion on July 1, 1993, the location of the property converted and its protection status at Goose Pond Industrial Park in Scottsboro, Alabama, and thereafter Capital Alliance traveled to said location, reviewed the protected property and optioned to await a judicial decision on the Jacobs title claim. (C.-677-678). Moreover, since Petitioner timely informed Respondents of the Jacobs lawsuit alleging title to the Industrial equipment insured by Capital Alliance, the Respondents acts, when it renewed and re-insured such collateral to Industrial in conformity with the banking requirements to insure the loss payee interest under all policies insured up to their expiration on January 28, 1997, conclusively shows its acknowledgment of the claim without further proof. Moreover, Industrial has shown that these are the same payee insurance proceeds that were claimed by Whitney National Bank in Count II of its action filed against Industrial. Whitney claimed that any such payment to Industrial was the collateralized security under its March 20, 2001, note action. Petitioner submits that these facts should, unless rebutted before a jury, conclusively show Respondents' liability under any one or all policies issued by Respondents covering the period from July 1992 to January 28, 1997. Clearly, Capitals' failure to pay a proper coverage payment demand renders Capital liable for unnecessary defense cost in a breach of contract action. Therefore, the failure of a duty to defend provision is also misleading.

At page 4 of the Respondents' Brief, they concluded that during December, 2001, Industrial did obtain a judgment against Jacobs Bank for conversion, which they contend was appealed after the trial court set aside the punitive damages imposed by the jury. Respondents omit to state that Jacobs Bank did not appeal the issue of conversion found adverse to Jacobs on December 7, 2001, or the court judgment concerning the assessment of compensatory damages for the conversion. Therefore, Respondents omit facts showing that the event of conversion was conclusively established on to-wit: December 7, 2001, well before the Whitney action against Industrial on July 2,

2002, and before Industrial's demands for the coverage or benefits on April 5, 2002. Therefore, Respondents omit facts that conclusively show a denial of coverage benefits by the Capital letter on August 14, 2002.

At page 4 of Respondents' Brief, the Respondents conclude that the trial court, after an appellate decision, entered judgement against Jacobs Bank and in favor of Industrial for the sum of $480, 310.00 plus accrued interest until November 19, 2003. They also allege satisfaction of judgement on January 6, 2004. Although the Respondents seem to imply that Industrial was paid for all of its losses at a later time, Respondents omit to state that the law of conversion damages in Alabama, and the Jacobs award would not compensate Industrial for property losses insured and due under the Respondents' coverage provisions. Respondents omit to state that even under the 1992-1993 policy, Industrial incurred additional contract losses after the December 7, 2001, award and litigation expense in the Whitney litigation, for Capital's failure to pay which would have been prevented by proper payment under the 1992-1993 policy. Respondents omit to state that losses under the 1995-1996 policy and the renewal policy in 1996-1997 were valued as replacement value without deduction for depreciation and covered losses far in excess of the Jacobs award.. Moreover, Respondents omit to state that Industrial had provided all information they sought on May 4, 1998. It is undisputed that they did not request any new information after May 4, 1998, or assert a basis of claim denial, which is clearly a waiver under Alabama law. Rhode Island Ins. Co. v Holley, 226 Ala. 320, 146 So. 817 (1933); Home Ind. Co. v. Reed Equipment Co., 381 So2d 45 (Ala. 1980).

At pages 5 and 6 of their Brief, the Respondents also contend that (1) all policies provide a limitation of the time in which an insured can bring an action concerning a policy provision (2) a faxed memo from its agent, Fred Gouge, on May 11, 1994, was not responded to by Richard Hill as agent for Industrial and (3) that Mr. Hill did not contact Capital Alliance concerning a claim until February 1998. The Respondents omit to inform the Court that (1) Alabama law prevents insurance companies such as the Capitals from inserting such time limitations in policies of insurance issued in Alabama, which

renders such provisions unenforceable under 6-2-15, Code of Alabama, 1975; and Hopkins v. Lawyers Title Ins. Co. 514 So.2d 786 (Ala. 1975); (2) The alleged faxed memo of May 11, 1994, from Fred Gouge is not shown to have been received by Industrial and, even if received, fails to describe or address any issues or question presented under the policy; (3) that Industrial agents fully informed Capital Alliance on May 12, 1997, when a claim was filed by Ms. Pat Wingard, as Industrial's claim agent (Turner Insurance and Bonding Company) (C.-830) and, again, on January 18, 1998, by its counsel who forwarded much material to the Capitals during March 1998. Moreover, Respondents omit to state that they did not request any relevant information after Industrial insisted on proceeding with a claim and provided claims information to the Capitals during May, 1997, January 1998, February 1998, March 1998, and a most thorough and complete sworn proof of loss deposition on May 4, 1998.

The statements made on pages 9 and 10 of the Respondents' Brief, alleging that Industrial never requested a defense to the Jacobs Bank claim is also confusing because it ignores an undisputed and absolute demand for all coverage benefits on May 4, 1998.

In their Brief on page 19, the Respondents conclude or imply that the Alabama Supreme Court found that a failure of Petitioner to supply a requested proof of claim provided sufficient legal grounds under Alabama law to deny the Petitioner's claim but omits to state that such action is proper only where a valid reason exists to provide it in a form proof of claim, such as those forms needed for computer loading purposes, and other purposes desired by the company, which purpose or purposes were not conveyed to Petitioner and, indeed, not mentioned prior to litigation. Respondents omit to state that Alabama otherwise holds that no particular type proof of claim is required. Petitioner also omits to state that the first proof of claim form filing request by Capital Alliance Insurance Company, an Alabama insurance corporation, sent to Industrial's counsel was designated a Florida form proof of claim which did not conform to a valid purpose. The Capitals never used a failure of proof of claim or failure of information as a basis of withholding further action or claim denial at anytime prior to the litigation in this case. See Equitable